Filed 10/5/10 Reilly v. Cowitt CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARK REILLY et al., Plaintiffs and Respondents, v. RICHARD L. COWITT et al., as Trustees, etc., Defendants and Appellants.	B220439 (Los Angeles County Super. Ct. No. BC392647)

APPEAL from an order of the Superior Court of Los Angeles County, John A. Kronstadt, Judge. Affirmed.

Law Offices of Frances L. Diaz and Frances L. Diaz for Defendants and Appellants.

Snyder ♦ Dorenfeld, David K. Dorenfeld and Michael W. Brown for Plaintiffs and Respondents.

This is an appeal from the denial of a petition to compel arbitration. The trial court found that appellants waived their right to arbitrate. We agree and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

In July 2005, respondents Mark Reilly and Robin Morselli purchased a single family home in Agoura Hills from appellants Richard L. Cowitt and Judith A. Cowitt, individually and as cotrustees of the Richard and J.A. Cowitt Family Trust. The standard form residential purchase agreement published by the California Association of Realtors was used for the transaction. This agreement contained a provision for alternative dispute resolution. The parties agreed to mediate any dispute before resorting to arbitration or court action, and pursuant to a separately initialed arbitration provision, they agreed that any dispute not resolved by mediation would be submitted to neutral binding arbitration.

In June of the following year, respondents notified appellants and the real estate agents of various problems with the property, including drainage issues and excessive noise from neighbors. They asserted these were defects which should have been disclosed, but were not. Respondents made informal efforts to resolve the dispute, but ultimately retained attorney Brian Kahn to assist them.

In December 2006, Mr. Kahn wrote a letter to Frances Diaz, appellants' counsel, setting out the problems with the property and demanding mediation. After several telephone conversations, an informal mediation session was scheduled for March 2007, then was rescheduled for April 4, 2007. The mediation was conducted but no settlement resulted.

The attorneys exchanged several emails and telephone calls over the next few months. On July 24, 2007, Mr. Kahn sent a letter to Ms. Diaz demanding arbitration. She responded that the arbitration demand was premature because there had not been a mediation with a professional mediator, as required under the purchase agreement. Mr. Kahn responded by letter that he and respondents considered the April mediation sufficient to satisfy the contract requirements. Despite this position, he proposed that

appellants select a mediator from an enclosed list. Ms. Diaz agreed to the use of Deborah Rothman as mediator. On September 26, 2007, Mr. Kahn sent a letter to Ms. Diaz regarding Ms. Rothman's availability in November or December. The mediation was never scheduled. According to Mr. Kahn, Ms. Diaz never responded to his September letter. According to appellants, respondents failed to arrange the mediation.

Respondents relieved Mr. Kahn and retained new counsel. On June 13, 2008, respondents filed this action against appellants, their real estate agents, respondents' real estate agent, real estate broker, and the home inspector hired by respondents.

On October 21, 2008, the matter came on for a case management conference before Judge (now Justice) Elizabeth Grimes. Counsel for respondents did not appear. Ms. Diaz appeared for appellants. Counsel for defendant Coldwell Banker requested a continuance because its cross-complaint had not yet been answered and there was a defendant who had not yet been served. Ms. Diaz agreed: "I think continuing this conference at least 45 days would really be important because we don't even have all the parties." The court continued the conference to December.

At the December 3, 2008 case management conference, Judge Grimes began to discuss available dates in June 2009. Appellants' counsel asked, "A June date for what?" The court explained it was for trial, at which point Ms. Diaz told the court "the matter had been agreed upon as requiring mediation" before going to trial. The court replied, "Yes, I'll refer you to mediation, but if that fails, you'll need a trial, won't you?" Ms. Diaz responded, "It was my understanding that the plaintiffs' attorney had agreed that all the parties have to submit to mediation prior to having the matter set before the superior court because of the real estate contract." To this, the court replied, "Who do you think I am?"

Respondents' counsel, David Dorenfeld, corrected Ms. Diaz's statement. "There was a prelitigation mediation in compliance with the agreement. I agreed with counsel that we would try to mediate again, but it was not in any way imposing on the court to postpone a trial date." The court observed that "the likelihood of this case going to trial

is less than 99.9 percent." But the court also observed that "nothing gets a case settled more than a firm trial date in a department where the judge is known for not continuing cases." To this, Ms. Diaz replied, "June would be fine with me, your honor." After further discussion of dates, the court set July 20, 2009 for trial. Ms. Diaz stated, "Good for me, your honor."

Mr. Dorenfeld asked for a referral to mediation "with a cutoff date, and I think that we probably would select a private mediator." The court asked what cutoff date to order. Ms. Diaz replied, "I think it would be a good thing, the sooner the better. Perhaps February 28th?" Respondents' counsel agreed, but counsel for Coldwell Banker asked to move it to April so that she could complete "a little discovery . . . ." The court set a 120-day deadline of April 2, and encouraged the parties to resolve the case.

Coldwell Banker noticed the depositions of respondents for early March 2009. Appellants' counsel was present and asked questions at each deposition. Appellants were also served with respondents' written discovery responses and with their designation of expert witnesses.

On April 17, respondents' counsel sent a letter to all counsel indicating a May 15, 2009 mediation date was set. The mediation was conducted on that date, but settlement was not reached with appellants. The matter was resolved as to all other defendants by written settlement agreement; notice of the settlement was filed on June 4, 2009. Appellants filed a petition to compel arbitration on June 9, just six weeks before the July 20 trial date.

The petition to compel arbitration came on for hearing on July 6, 2009, before Judge John Kronstadt.[1] The court was concerned about whether appellants had informed Judge Grimes of their intent to seek arbitration, or their position that arbitration was mandatory. Ms. Diaz admitted it was not stated "in those words" but asserted Judge

---

[1] The settling parties filed for determination of good faith settlement, which came on for hearing at the same time as the motion to compel arbitration.

Grimes was aware of their position. The court continued the matter in order to obtain the transcripts of those hearings.

At the continued hearing on July 10, 2009, the court explained that the transcript of the December hearing did not support appellants' claim. The court denied the petition to arbitrate, finding that appellants had waived their contractual right to arbitration by participating in the litigation, failing to inform the court at the case management conference of their intent to seek arbitration, agreeing to a trial date, participating in discovery, and waiting until the very eve of trial to seek arbitration. The court also found prejudice would occur because the matter had been prepared for trial. Ms. Diaz asked for an opportunity to submit the transcript from the October hearing before Judge Grimes, during which she believed "Judge Grimes was told that this is a real estate contract that involves an arbitration." The court agreed to consider the additional transcript.

After reviewing the transcript of the October hearing, the court found nothing that warranted a change in its ruling. The court then set a March 2010 trial date. The court filed a "Memorandum and Order" setting out its ruling on September 17, 2009. Appellants filed a timely appeal from the order denying their petition to compel arbitration.

DISCUSSION

I

The trial court denied appellants' petition based on its determination that appellants had waived their right to arbitration. Appellants claim the question of waiver should have been decided by an arbitrator, not the court because the dispute was governed by the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16).

Under the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.), it is the court that decides whether the right to compel arbitration has been waived by the

petitioner.[2] But where the FAA applies, courts are divided on whether the question of waiver should be decided by the arbitrator or the court. (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2008) ¶ 5:172, pp. 5-131 to 5-132 (rev. #1, 2008).) We need not choose a side in this dispute, because the FAA does not apply to this contract.

The FAA provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The phrase "involving commerce" for purposes of the FAA may include an individual case which does not have a specific effect on interstate commerce "if, in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" (*Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56-57.) The sale of a single family residence in California, without more, does not meet that standard.

Appellants rely, instead, on a portion of the arbitration provision stating: "Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act." This sentence is part of the arbitration provision contained in the 2002 version of a standard form residential purchase agreement published by the California Association of Realtors. The arbitration clause also provides: "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding

---

[2] "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner . . . ." (Code Civ. Proc., § 1281.2. subd. (a).)

arbitration, . . . The arbitrator . . . shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure § 1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction."

The agreement continues: "'NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. . . . IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.'" This provision was initialed by appellants and respondents.

The same standard form contract, including an identical arbitration provision, was considered by Division 1 of this district in *Valencia v. Smyth* (2010) 185 Cal.App.4th 153. The court held the invocation of the FAA for purposes of interpretation of the agreement was not a designation of the procedural provisions of the FAA to control the arbitration. "[B]y adopting the FAA for purposes of contract interpretation, the parties did not displace the procedural provisions of the CAA. Both the FAA and the CAA employ the *same* principles of contract interpretation. Thus, regardless of which act governs the interpretation of the Agreement, the result is the same: Under the 'plain meaning' rule, the Agreement's choice-of-law provision requires the application of the CAA's procedural provisions." (*Id.* at p. 157.)

We reach the same conclusion. The agreement expressly selects the substantive and procedural law of California. It invokes the FAA only with respect to the

interpretation of the agreement. The question whether appellants waived their right to enforce the arbitration agreement did not require interpretation of the agreement; instead it required an evaluation of appellants' conduct. The parties did not agree to have that determination made under the FAA. As the United States Supreme Court explained in *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 479, arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [citation], so too may they specify by contract the rules under which that arbitration will be conducted." Under the choice of law provision in the arbitration agreement, California law was to be applied to all issues except the interpretation of the agreement. The FAA thus did not apply to resolution of the question of waiver.

II

We turn to the court's finding of waiver.[3] "Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by substantial evidence, is binding on the appellate court." (*St. Agnes, supra*, 31 Cal.4th at p. 1196.)

In *Saint Agnes*, the Supreme Court explained that "no single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*Id.* at p. 1195.) The court adopted several factors to be considered in assessing waiver claims: """(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important

---

3 In the arbitration context, the term "waiver" is a shorthand statement for the determination that a contractual right to arbitrate a dispute has been lost. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (*St. Agnes*).)

intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.'"" (*Id*. at p. 1196.)

The trial court found several of these factors were present in this case, and the evidence supports this conclusion. Appellants' conduct was inconsistent with an intent to arbitrate. The parties engaged in an unsuccessful mediation session in April 2007. Appellants then rejected respondents' request to arbitrate as premature, asserting there had not been a formal mediation as required as a prerequisite under the agreement. Although respondents agreed to a second mediation, efforts to schedule it failed. Had appellants had an interest in arbitrating the action, they could have acceded to respondents' request, or pursued the second mediation; they did neither.

Even after respondents filed this lawsuit, appellants' conduct was inconsistent with the right to arbitrate. Their counsel attended two case management conferences and agreed to a trial date without once mentioning to the court that they intended to arbitrate the dispute. Even when counsel indicated appellants' desire to mediate, she gave no suggestion that if the case did not settle, the next step would be arbitration rather than trial. Instead, she agreed to a trial date.

The litigation machinery had been "substantially invoked" at the time appellants sought arbitration. The trial date was just six weeks away, discovery had been conducted, respondents had designated their expert witnesses. By that time, none of the benefits of arbitration, "as a speedy and relatively inexpensive means of dispute resolution" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10), would be realized. The court addressed this circumstance in *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 997: "We acknowledge that arbitration is the preferred method of resolving disputes. However, the benefits it can provide, to both the parties and an already overburdened judicial system, become illusory when there is a failure to timely and affirmatively implement the procedure."

We find substantial evidence supports the trial court's finding that appellants waived their right to arbitrate.

DISPOSITION

The order is affirmed. Respondents are to have their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.